Feb 8 1872

Case submitted on Printed Briefs

Mr Grant submits

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~302.~~ 103

SOLOMON G. KITCHEN, PLANTIFF IN ERROR,

vs.

HENRY H. BRADFORD AND RANDOLPH WEBBER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MISSOURI.

FILED NOVEMBER 21, 1870.

Feb 14, 1872

Argument for

Pltf in Error

Mr Bradley

SUPREME COURT OF THE UNITED STATES.

No. 302.

SOLOMON G. KITCHEN, PLAINTIFF IN ERROR,

vs.

HENRY H. BRADFORD AND RANDOLPH WEBBER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MISSOURI.

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1 MISSOURI DISTRICTS, *sct:*

Pleas before the honorable circuit court of the United States for the districts of Missouri at the April term thereof, A. D. 1870.

SOLOMON G. KITCHEN, PLAINTIFF,
agt.
HENRY H. BEDFORD ET AL., DEFENDANTS. } Trover.

Be it remembered that heretofore, to wit, on the twenty-first day of August, A. D. 1868, there was filed in the office of the clerk of the circuit court of the United States for the districts of Missouri, the following declaration to wit:

Declaration.

In the circuit court of the United States for the districts of Missouri, October term, 1868.

SOLOMON G. KITCHEN
vs
HENRY H. BEDFORD, RANDOLPH WEBBER, & Daniel B. Miller.

DISTRICTS OF MISSOURI, *ss:*

Solomon G. Kitchen, who is a citizen of the State of Arkansas, complains of Henry H. Bedford, Randolph Webber, and Daniel B. Miller, who are citizens of the State of Missouri, of a plea of trespass on the case, for that whereas the said plaintiff, heretofore, to wit, on the first day of December, eighteen hundred and sixty-six, at the districts of Missouri aforesaid, was lawfully possessed as of his own property of divers bonds to wit, one hundred and nineteen bonds of the Cairo and Fulton Railroad Company, a company incorporated by the laws of the State of Missouri, each and all of said bonds bearing date May 23, 1857, signed M. Brayman as president and G. K. Teasdale as secretary, and
2 having affixed thereto the corporate seal of said company and countersigned by John Moore, John Wilson, and A. G. Waterman, trustees, whereby the said Cairo and Fulton Railroad promised and agreed to pay to or assigns the sum of one thousand dollars, in the city of New York, on the first day of October, 1882, and also interest for the same from the first day of October, 1857, at the rate of seven per centum per annum, payable on the first days of October and April, in each and every year ensuing the date thereof, until said principal sum should be paid, to be paid upon the presentation of the interest warrants annexed to said bonds, as they severally become due, each of said warrants being for the sum of thirty-five dollars, and there being then and there forty-four of said warrants attached to each of said bonds, of great value, to wit, of the value of three hundred and two thousand two hundred and sixty dollars, and being so possessed, the said plaintiff afterwards, to wit, on the day and year first above mentioned at the districts of Missouri aforesaid, casually lost the said bonds, and said interest warrants thereto attached, out of his possession, and the same afterwards, to wit, on the day and year first aforesaid, at the districts of Missouri aforesaid, came to the possession of said defendants by finding, yet the said defendants, well knowing the said bonds and interest warrants to be the property of the said plaintiff and of right to belong and

appertain to him, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said plaintiff in this behalf, have not as yet delivered the said bonds and interest warrants, or either or any of them, or any part thereof to the said plaintiff, although often requested so to do, and have hitherto wholly refused so to do, and afterwards, to wit, on the day and year last aforesaid, at the districts of Missouri aforesaid, converted and disposed of said bonds and interest warrants to their own use; wherefore the said plaintiff saith that
3 he is injured and hath sustained damage to the amount of three hundred and two thousand two hundred and sixty dollars, and therefore he brings his suit.

EWING & HOLLIDAY,
Attorneys for Pl'ff.

Upon this declaration the following summons was issued to wit:

Summons.

MISSOURI DISTRICTS, *sct:*

The President of the United States of America to the marshal of the eastern district of Missouri, greeting:

You are hereby commanded to summon Henry H. Bedford, Randolph Webber, and Daniel B. Miller, citizens of the State of Missouri, that they be and appear before the honorable circuit court of the United States for the districts of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said districts, on the first Monday of October next, then and there to answer unto Solomon G. Kitchen, a citizen of the State of Arkansas, in a plea of trespass on the case, to the damage of said plaintiff, three hundred & two thousand, two hundred and sixty dollars. Hereof fail not, and have you then and there this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, the twenty second day of August, A. D. eighteen hundred and sixty-eight.

Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[L. S.] BEN. F. HICKMAN,
Clerk of said Court.

And upon this summons the marshal made the following return, to wit:

Marshal's return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Served this summons by reading the same, together with a copy of the declaration in this cause to the within-named Henry H. Bedford, Randolph Webber, and Daniel B. Miller, at Stoddard County, Mo., on the 14th day of Sept., 1868.

4 J. B. ROGERS,
U. S. Marshal East. Dist. of Mo.

And afterwards, at a regular stated term of the circuit court of the United States for the districts of Missouri, begun and held at the city of St. Louis in said districts on the first Monday of October, A. D. 1868,

the following proceedings took place in this case on Tuesday, October 6th, 1868, to wit:

SOLOMON G. KITCHEN, PLAINTIFF,
agst.
HENRY H. BEDFORD ET AL., DEFENDANTS. } Trover.

Plea filed.

This day come the defendants, by attorney, and file their plea of not guilty to the action of plaintiff herein against them.

The plea filed as aforesaid is in the words and figures following, to wit:

Plea.

In the United States circuit court for the districts of Missouri, October term, 1868.

HENRY H. BEDFORD, RANDOLPH WEBBER, and Daniel B. Miller,
ats.
SOLOMON G. KITCHEN.

And the said defendants come and defend the wrong and injury when, &c., and say that the plaintiff his action thereof aforesaid against them ought not to have and maintain, because they say that they are not, nor is any of them guilty of the wrong and injury against them in the said declaration alleged; and of this they put themselves upon the country.

THO'S T. GANTT, *P. D.*

Jury waiver filed.

And afterwards, to wit, on the fifth day of April, A. D. 1869, there was filed in the clerk's office of said circuit court the following waiver of jury, to wit:

Jury waiver.

S. G. KITCHEN
vs. } No. 74.
BEDFORD & WEBBER.

In this cause a jury is waived by consent of parties.
St. Louis, April term, 1869.

THO'S T. GANTT, *P. D.*
EWING & HOLLIDAY,
Atty's for Pl'ffs.

And afterwards, at a regular stated term of said circuit court, to wit, at the April term thereof, 1869, the following further proceedings were had in said case on Thursday, April 15th, 1869, to wit:

SOLOMON G. KITCHEN, PLAINTIFF,
ag'st
HENRY H. BEDFORD ET AL., DEFENDANTS. } Trover.

Continuance by consent.

This day come the parties herein, by attorneys, and, by consent, it is ordered that this case be continued until the next term of this court.

And afterwards, at a regular stated term of said circuit court, to wit, at the April term, 1870, the following further proceedings were had in said case on Tuesday, May 10th, 1870, to wit:

SOLOMON G. KITCHEN, PLAINTIFF,
ag'st
HENRY H. BEDFORD ET AL., DEFENDANTS. } Trover.

Case dismissed as to defendant Miller.

This day come the parties, by attorneys, and, on motion of plaintiff's attorney, it is ordered that this case be, and the same is now hereby, dismissed, as to the defendant Daniel B. Miller.

Hearing.

And an agreement having been heretofore filed herein, waiving a jury in this case, and consenting and agreeing that the same may be tried by the court without the intervention of a jury, and said case being regularly called for trial, and both parties being ready, said ease was thereupon tried by the court, without the intervention of a jury, and was submitted to the court on the pleadings, and proofs and arguments of counsel.

Finding.

And the court, on consideration thereof, and being fully advised
6 of and concerning the premises, finds for the defendants, on the issues joined herein—

Judgment.

It is, therefore, now considered by the court, that the plaintiff, Solomon G. Kitchen, take nothing by his writ herein, and that the defendants Henry H. Bedford, Randolph Webber, and Daniel B. Miller, go hence, without day, and recover against the said plaintiff the costs in this behalf expended, and that execution or a fee bill be issued for such costs.

And afterwards, at said last mentioned regular stated term of said circuit court, the following further proceedings were had in said case, on Friday, May 13th, 1870, to wit:

Motion for a new trial filed.

SOLOMON G. KITCHEN, PLAINTIFF,
ag'st
HENRY H. BEDFORD ET AL., DEFENDANTS. } Trover.

This day comes the plaintiff, by his attorneys, and files his motion in writing to set aside the verdict and judgement rendered herein, and to grant a new trial, for the reasons and on the grounds in said motion set forth.

Motion for a new trial.

SOLOMON G. KITCHEN
vs.
HENRY H. BEDFORD AND OTHERS.

UNITED STATES OF AMERICA,
Districts of Missouri, ss:

In the circuit court of the United States, within & for said districts.

And now, at this day, comes the plaintiff, and moves the court to set aside the judgment and verdict rendered in this cause, and grant him a new trial, for the following reasons, to wit:

1st. Because the court erred in declaring, at the instance of defendants, that upon the evidence introduced by plaintiff, he, plaintiff, could not recover.

2nd. Because the court erred in declaring the law of the case
7 as asked by defendants.

3d. Because the court erred in excluding competent and relevant testimony offered by plaintiff.

4th. Because the court erred in admitting competent and proper evidence offered by defendants.

5th. Because the finding and judgment are contrary to the law.

6th. Because the finding and judgment are contrary to the evidence.

7th. Because the court erred in rendering judgment for defendants.

EWING & HOLLIDAY,
Att'ys for Pl'ff.

And afterwards, at said last mentioned regular stated term of said circuit court the following further proceedings were had in said case on Tuesday, May 17th, 1870, to wit:

Motion for new trial overruled.

SOLOMON G. KITCHEN, PLAINTIFF,
ag'st
HENRY H. BEDFORD ET AL., DEFENDANTS. } Trover.

This day come the parties, by attorneys, and the court, having examined the motion heretofore filed by plaintiffs to set aside the verdict and judgement rendered herein, and to grant a new trial, and being duly advised of and concerning the same, now orders that said motion be, and the same is hereby, overruled.

And afterwards, at said last mentioned regular stated term of said circuit court, the following further proceedings were had in said case, on Saturday, May 28th, 1870, to wit:

Bill of exceptions filed.

SOLOMON G. KITCHEN, PLAINTIFF,
ag'st
HENRY H. BEDFORD ET AL., DEFENDANTS. } Trover.

This day come the parties, by attorneys, and with the consent of de-

fendant's attorney, said plaintiff files his bill of exceptions to
8 the rulings and finding of the court in this case, which, being examined and approved by the court, is signed, sealed, and ordered to be made part of the record herein.

The bill of exceptions, filed as aforesaid, is in the words and figures following, to wit:

Bill of exceptions.

SOLOMON G. KITCHEN
v.
HENRY H. BEDFORD & R. WEBER.

In the circuit court of the United States for the districts of Missouri.

Be it remembered that, on the trial of this cause, plaintiff gave evidence tending to prove the following facts, to wit: That plaintiff, on the 16th March, 1866, was the owner of the bonds and coupons described in the declaration, and that they were payable in the manner in said declaration stated; that on said day and year plaintiff gave said bonds and coupons to his wife, Martha A. Kitchen, and on said day plaintiff put said bonds and coupons in the hands of one W. C. Rayburn, on the terms and for the purposes set out in a certain writing, under seal, hereinafter set forth, and executed by said Rayburn, and delivered to plaintiff on said day; that in December, 1866, the said Rayburn sold and delivered said bonds and coupons to defendant Bedford for ten thousand dollars, who, afterwards, and before the commencement of this suit, sold and delivered the same to defendant Webber, who, afterwards, & before the commencement of this suit sold the same for $26,340; that said defendants before, and at the time said bonds and coupons were sold by Rayburn, knew the purposes for which they were held by said Rayburn, as expressed in said writing, but said they supposed said Rayburn had some claim on them; that before the commencement of this suit plaintiff made a demand of defendants for said bonds and coupons, and that they refused to deliver the same to plaintiff.

9 Plaintiff then read in evidence the instrument aforesaid:

"WALCOT, ARK., *March* 16, 1866.

"Received from Martha Kitchen, the sum of one hundred and nineteen thousand dollars in bonds of The Cairo & Fulton Railroad Company of Missouri, and I also received fifty thousand four hundred and five dollars of coupons or interest warrants, due and owing by said company, amounting in the aggregate to the sum of one hundred and sixty-nine thousand four hundred and five dollars, which said sum I promise to expend in the purchase of lands from John Moore, John Wilson, and Albert G. Warterman, trustees of the said Cairo & Fulton Railroad Company of Missouri, at or near the *the* average price of five dollars per acre, taking the deeds in my own name; and I further promise to sell all the lands purchased as aforesaid, as soon as possible, at such prices as the said Kitchen may direct, and if I should fail to sell all said lands, as soon as said Kitchen may desire them, I promise to sell the same at public auction, whenever so directed by the said Kitchen, and after deducting the expenses of stamps and the necessary travelling expenses, to pay unto the said Martha A. Kitchen, or her legal represen-

tatives, seven-eight's of all the money that I may sell the said lands for.

"Given under my hand and seal the date above written.

"W. C. RAYBURN." [SEAL.]

[5 ct. rev. stamp, can.]

The foregoing was all the evidence offered by plaintiff.

The court then, at the instance of defendants, declared the law to be that, on the evidence in the cause, plaintiff could not recover.

And plaintiff at the time duly excepted to the ruling of the court.

10 The plaintiff then filed his motion for a new trial, as follows:

(See page 6 of this transcript.)

The court overruled said motion and refused to grant a new trial, and plaintiff at the time duly excepted to said ruling.

And that all the matters aforesaid may become a part of the record, the plaintiff tenders to the court, this, his bill of exceptions, and prays that the same may be signed, sealed, and made a part of the record in this cause, which is accordingly done.

SAMUEL TREAT, *Judge.* [SEAL.]

And on the said twenty-eighth day of May, 1870, said plaintiff, having been allowed a writ of error to the Supreme Court of the United States, filed in said circuit court his bond for the sum of five hundred dollars, with Samuel N. Holliday, as surety, which bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, Solomon G. Kitchen, as principal, and Samuel N. Holliday, as surety, are held and firmly bound unto Henry H. Bedford and Randolph Weber, in the full and just sum of five hundred dollars, to be paid to the said Henry H. Bedford and Randolph Weber, their heirs, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 21st day of May, in the year of our Lord one thousand eight hundred and seventy.

Whereas lately at the April term, 1870, of the circuit court of the United States for the districts of Missouri, in a suit depending in said court between the said Solomon G. Kitchen, as plaintiff, and the said Henry H. Bedford and Randolph Weber, are defendants, judgment was rendered against the said plaintiff, Solomon G. Kitchen, and the said Solomon G. Kitchen, plaintiff, having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendants, Bedford & Weber, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Soloman G. Kitchen, shall prosecute said writ to effect, and answer all damages and costs if he shall fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

SOLOMON G. KITCHEN. [SEAL.]
SAM'L N. HOLLIDAY. [SEAL.]

Approved by—

SAMUEL TREAT, *Judge.*

11 UNITED STATES OF AMERICA:
Circuit Court for the Districts of Missouri, ss:

I, Benjamin F. Hickman, clerk of the circuit court of the United States in and for the districts of Missouri, do hereby certify the writing hereto annexed to be a transcript of the record and proceedings in case of Solomon G. Kitchen, plaintiff, against Henry H. Bedford et al., defendants, as fully as the same remain on file and of record in said case, in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said districts, this fifteenth day of June, in the year of our Lord eighteen hundred and seventy.

[SEAL.] BEN. F. HICKMAN,
Clerk of said Court.

12 (Indorsed:) United States circuit court, districts of Missouri. Solomon G. Kitchen against Henry H. Bedford et al. Duly certified copy of the record and proceedings in the above-entitled cause.

13 THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the circuit court of the United States for the districts of of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the April term thereof, 1870, between Solomon G. Kitchen, plaintiff, and Henry H. Bedford and Randolph Webber, defendants, a manifest error hath happened, to the great damage of the said plaintiff, Solomon G. Kitchen, as by his complaint appears; we, being willing that error, if any hath been, should be duly corrected and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this twenty-first of May, in the year of our Lord one thousand eight hundred and seventy.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the district of Missouri, dated as aforesaid.

BEN. F. HICKMAN,
Clerk C. C. U. S., Missouri Districts.

Allowed by—

SAMUEL TREAT, *Judge.*

14 In obedience to the within writ of error, I herewith transmit to the Supreme Court of the United States a transcript of the record and proceedings in the within-entitled case.

Given under my hand at St. Louis, Missouri, this 15th day of June, A. D. 1870.

BEN. F. HICKMAN,
Clerk of the Circuit Court of the United States for the Districts of Missouri.

15 The United States of America to Henry H. Bedford and Randolph Webber, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the districts of Missouri, wherein Solomon G. Kitchen is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, one of judges of the circuit court of the United States for the districts of Missouri, this 28th day of May, in the year of our Lord one thousand eight hundred and seventy.

SAMUEL TREAT.

16 Service of this citation is admitted this 31 October, 1870, at St. Louis, Mo., by—

THO'S T. GANTT,
Attorney for Defendants in Error.

(Indorsement on cover:) No. 302. Solomon G. Kitchen, plaintiff in error, vs. Henry H. Bedford and Randolph Webber. Missouri C. C. U. S. Filed 21st November, 1870.

In the Supreme Court of the United States.

DECEMBER TERM, A. D. 1871.

SOLOMON G. KITCHEN
vs.
H. H. BEDFORD AND R. WEBBER. } No. 103.

This cause comes up by writ of error to the Circuit Court of the United States for the District of Missouri. The plaintiff in error was plaintiff in the action below.

The action was trover to recover the value of certain railroad bonds and coupons, and a jury being waived, the cause was tried by the court. Record, p. 4.

The plaintiff's evidence being closed, "the court, at the instance of the defendants, declared the law to be that on the evidence in the cause plaintiff could not recover." (Rec., p. 7.) To which the plaintiff excepted.

The question for this court is as to the correctness of this ruling. In other words, whether upon the evidence a jury would have been authorized to render a verdict for the plaintiff.

The evidence was altogether on the part of the plaintiff, and is briefly set out in the bill of exceptions. Rec., p. 6, which is copied below.

If, in any view of that evidence which a jury was authorized to take, a verdict might have been given for the plaintiff and judgment rendered thereon, then this judgment must be reversed, and the case remanded with a *venire de novo*.

THE CASE

is thus stated in the bill of exceptions:

Be it remembered that, on the trial of this cause, plaintiff gave evidence tending to prove the following facts, to wit: That plaintiff, on the 16th March, 1866, was the owner of the bonds and coupons described in the declaration, and that they were payable in the manner in said declaration stated; that on said day and year plaintiff gave said bonds and coupons to his wife, Martha A Kitchen, and on said day plaintiff put said bonds and coupons in the hands of one W. C. Rayburn, on the terms and for the purposes set out in a certain writing, under seal, hereinafter set forth, and executed by said Rayburn, and delivered to plaintiff on said day; that in December 1866, the said Rayburn sold and delivered said bonds and coupons to defendant Bedford for ten thousand dollars, who afterwards, and before the commencement of this suit, sold and delivered the same to defendant Webber, who, afterwards, and before the commencement of this suit, sold the same for $26,340; that said defendants before, and at the time said bonds and coupons were sold by Rayburn, knew the purposes for which they were held by said Rayburn, as expressed in said writing, but said they supposed said Rayburn had some claim on them; that before the commencement of this suit plaintiff made a demand of defendant for said bonds and coupons, and that they refused to deliver the same to plaintiff.

Plaintiff then read in evidence the instrument aforesaid:

"WALCOT, ARK., *March* 16, 1866.

"Received from Martha Kitchen, the sum of one hundred and nineteen thousand dollars in bonds of the Cairo & Fulton Railroad Company of Missouri, and I also received fifty thousand four hundred and five dollars of coupons or interest warrants, due and owing by said company, amounting in the aggregate to the sum of one hundred and sixty-nine thousand four hundred and five dollars, which said sum I promise to expend in the purchase of lands from John Moore, John Wilson, and Albert G. Waterman, trustees of the said Cairo & Fulton Railroad Company of Missouri, at or near the average price of five dollars per acre, taking the deeds in my own name; and I further promise to sell all the lands purchased

as aforesaid, as soon as possible, at such prices as the said Kitchen may direct, and if I should fail to sell all said lands, as soon as said Kitchen may desire, then I promise to sell the same at public auction, whenever so directed by the said Kitchen, and after deducting the expenses of stamps and the necessary travelling expenses, to pay unto the said Martha A. Kitchen, or her legal representatives, seven-eighths of all the money that I may sell the said lands for.

"Given under my hand and seal the date above written.

"W. C. RAYBURN." [SEAL.]

The foregoing was all the evidence offered by plaintiff.

The court then, at the instance of defendants, declared the law to be that, on the evidence in the cause, plaintiff could not recover.

And plaintiff at the time duly excepted to the ruling of the court.

I.

The first question in the case, is whether there was evidence for the jury of any such property in the plaintiff as would enable him to maintain the action.

The evidence was—

1. That the plaintiff on the day laid in the declaration was the owner of the bonds and coupons.

2. That on said day he gave them to his wife, Martha A. Kitchen.

3. That on said day he "put them in the hands" of Reyburn for a certain purpose.

It was contended below that a jury might have found from this evidence that the plaintiff, at the time of delivering the property, held it as the agent of Martha A. Kitchen only, and that the wife should have been joined.

But we insist that the evidence does not naturally or properly lead to such a conclusion, and that a jury not only could (which is sufficient for our purpose) but ought to have given it a different construction.

It is not said that the plaintiff ever delivered the bonds to his wife.

"Delivery is essential, both at law and in equity, to the validity of a parol gift of a chattel or chose in action; and it is the same whether it be a gift *inter vivos* or *causa mortis*. Without actual delivery the title does not pass." IV Kent Com., Lec. 38, p. 438, and cases there cited.

As between husband and wife still less could any such valid transaction have place. And if the bonds had been delivered to her, still, when he resumed possession of them they would become his own. A jury then could and ought to have found that the bonds were plaintiff's property at the time of delivery.

If the gift of the plaintiff to his wife has any place in this transaction, we must understand it as meaning the dedication of the bonds to her use in the manner agreed between the plaintiff and Reyburn.

The receipt indeed acknowledges the receipt of the bonds from Martha A. Kitchen, but this is to be construed in connection with the rest of the evidence, which shows the truth to be that the bonds were received from the plaintiff, and were his property, and were intended to be dedicated to his wife's use *in the manner provided in said* receipt. But all this is immaterial. The husband alone can bring *trover* for conversion of the wife's chattels. Saunders Pl. & Ev., tit. Trover, p. 886, also 568.

The plaintiff then, whether he was the owner of the bonds when he delivered them to Reyburn, or not, may maintain this action.

2d. What then was the legal effect of the transaction between the plaintiff and Reyburn, as to the property in the bonds? Did that divest the plaintiff of the property in bonds?

By the agreement the bonds were "put in the hands" of Reyburn "to expend in the purchase of lands from * * *, the trustees of the said Cairo and Fulton Railroad Company;" *i e.*, the obligor.

We submit this was a mere bailment; it was a deposit of the bonds for a specific purpose, to be expended in the

purchase of lands, and in no other way; that was the one specific thing which Reyburn was to do with the bonds, and the persons with whom he is to deal are named.

It was then the "delivery of a thing in trust for some special object or purpose, and upon a contract expressed or implied to conform to the object or purpose of the trust," and so comes within the very letter as well as the spirit of Judge Story's definition of a bailment. Storey on Bailment, sec. 2, at end.

It was not a sale. No words are used applicable to a sale. The bonds are "are put into his hands." He "receives" them, and undertakes to "expend" them in the purchase of lands.

There can, we conceive, be no question that the agreement to expend applies to the specific property received.

In acknowledging the receipt of such a sum in bonds, and undertaking to expend the same sum, ["which sum" I promise to expend,] his undertaking is to apply those bonds to that object.

II.

Was there a conversion of the bonds?

Thsee defendants stand upon the same footing with Reyburn himself, The evidence was, "that said defendants, before and at the time said bonds and coupons were sold by Reyburn, knew the purposes for which they were held by Reyburn as expressed in said writing." Record, p. 6.

There was a conversion by each of them; and the plaintiff might have taken his verdict and judgment against either. Cooper *vs.* South, 4 Taunton, 802.

The ruling of the court denied the plaintiff any remedy against both or either.

The case may therefore be considered as if Reyburn were the defendant, and the sole defendant.

Does the case then show a conversion?

We have seen that the receipt imported a bailment for a specific purpose. By no fair construction could it be

held to have been a sale of the bonds from plaintiff to Reyburn, either in his own right or as agent of his wife.

If the bailment was for a specific purpose, and the defendant disposed of the bonds otherwise than he was bound to do by the terms of the bailment, this was a conversion for which he was liable in trover—the measure of damages, not now in question, depending upon all the circumstances of the case. If the defendant sold the bonds, instead of applying them to the specific purpose intended, his disposition of the proceeds to his own use, or that of the plaintiff, could only affect the measure of damages; but there was no evidence tending to show—not any attempt to prove—that the proceeds to any extent, or in any degree, went to the use of the plaintiff, or of his wife. Nor could any such application of the proceeds be presumed. It was for the defendant to give it in evidence. He left the case to stand upon the simple fact of conversion alone, for the legal consequences of which he was liable in this form of action, whatever other remedies may have been open to the plaintiff, either suing alone or joining his wife.

The bailee, for a consideration specified in the contract, undertook to give his personal labor and skill in the selection of the lands within the general description limited by the contract, to acquire titles and to sell.

By selling the bonds, instead of converting them into lands, the defendant disabled himself to fulfill the contract of bailment, which now became impossible and was rescinded, and the plaintiff, so far as the bailee was concerned, was remitted to his original right of property and possession.

In Bryant *vs.* Wardell, 2 Exch., (W. H. & G.,) 479, plaintiff had hired to defendant a stage and other property for a certain time. Defendant took the stage to pieces, and used the materials in constructing another stage. The court said: "As to the other point we are clearly of the opinion that trover is the proper form of action here, notwithstanding the continuance of the contract under which

the goods had been bailed to the defendants. The case of Cooper *vs.* Willamott (1 C. B., 672) is decisive authority upon this point. It was there held that a bailee of goods for hire by selling them determines the bailment, and the bailor may maintain trover against the purchaser, although the purchase was *bona fide*. The cases on the subject are referred to there. The rule is that where there has been a misuser of the thing lent, as by its destruction or otherwise, there is an end of the bailment, and the action for trover is maintainable for the conversion."

In Fenn *et al. vs.* Bittleston *et al.*, 7 Exch., (W. H. G.,) 152, A had conveyed goods to the plaintiff, reserving right of possession for a certain time. A became bankrupt and his assignee sold the goods. Plaintiff brought trover and recovered. Upon rule *nisi* the court said:

"But the learned counsel for the plaintiffs contended that if the bailment was for that term, it was put an end to by the act of the assignees, (whose act for this purpose is the same as that of Malpas himself,) in selling the chattels absolutely before the 23d of March, 1850, and so preventing themselves from returning them at the end of the term, and that such a sale was itself a conversion, *and we are of that opinion.*" And again—

"So in Wilkinson *vs.* King, (2 Campbell, 335;) Losechman *vs.* Machin, (2 Stark., 300); Cooper *vs.* Willamott, (1 C. B., 672,) it would rather seem that the bailment was for a time certain, viz., in each case from week to week. No distinction, however, appears to have been made by the court between such bailment and the one at will. But it was held that *the act of the bailee in doing a thing entirely inconsistent with the terms of the bailment, though not amounting to a destruction of the chattel, was a determination of the lawful bailment, and caused the possessery title to revert to the bailor, and entitled him to maintain an action of trover.*"

Rule discharged.

There can hardly be set up any pretence that the sale to the defendants was a step in pursuance of the purpose to convert the bonds into lands. The contract was to convert them directly—and we must presume—or at least a jury might have found that this could be done. And in fact, in mortgages by railroads in the west, the provision that the bonds shall be receivable for lands, is so common that it may as well be within the knowledge of a jury as any other of the common practices and usages of trade. Certainly at least the jury might infer from the evidence that the trustees of the road, named in the agreement, held lands to be exchanged for bonds.

Summary.

The case then reduces itself to this:

The plaintiff, desiring to make some provision for his wife, placed bonds in the hands of Reyburn, to be exchanged with the obligors for lands on certain terms, he undertaking, for a consideration, so to apply the bonds, and to hold and sell the lands for the wife's benefit. Instead of so applying the bonds he sold them, thus rendering the performance of the contract impossible. Can the plaintiff reclaim the bonds from parties who took them with a full knowledge of all the facts?

Conclusion.

Although this case was tried in matter of law and fact by the court, the ruling of the court must be considered as if it had been an instruction, to the same effect, given to a jury duly empannelled in the cause, directing them to find a verdict for the defendant.

We submit, then, that the judgment should be reversed and a *venire de novo* awarded.

J. M. CARLISLE,
J. D. McPHERSON,
For Plaintiff in Error.

In the Supreme Court of the U. S.

DECEMBER TERM 1870

ERROR TO THE U. S. CIRC'T COURT FOR MISSOURI.

SOLOMON G. KITCHEN,
Plaintiff in Error,

VERSUS

HENRY H. BEDFORD AND
RANDOLPH WEBBER,
Defendants in Error.

ARGUMENT OF THOS. T. GANTT,
for Defendants in Error.

SOLOMON G. KITCHEN,
Plaintiff in error,

VS.

HENRY H. BEDFORD and
RANDOLPH WEBBER,
Defendants in error.

In the Supreme Court of the U. S.
December Term 1871.
Error to the U. S. Circuit Court for
Missouri.

Kitchen sued Bedford, Miller and Webber in an action of trover—Miller died and as to him the suit was dismissed. The declaration was in the usual form, charging that plaintiff was lawfully possesed of certain Rail Road Bonds, that he casually lost them, that defendants found them and converted them to their own use. The defendants pleaded "not guilty."

The case was tried before the Court without the intervention of a Jury. At the trial the plaintiff proved that on 16th March, 1866, he was the owner of the bonds described in the declaration, that on that day he gave them to his wife, Martha A. Kitchen, and that on the same day he (presumably as her agent) placed them in the hands of Wm. C. Rayburn upon the terms set forth in the following instrument, viz:

"Walcot, Ark., March 16, 1866.

"Received from Martha Kitchen the sum of one hundred "and nineteen thousand dollars in bonds of the Cairo & Fulton "Railroad of Missouri, and I also received fifty thousand four "hundred and five dollars of Coupons or interest warrants due "and owing by said Company, amounting in the aggregate "to the sum of one hundred and sixty-nine thousand four "hundred and five dollars, which said sum I promise to ex- "pend in the purchase of lands from John Moore, John Wil- "son and Albert G. Waterman, Trustees of the Cairo & Ful- "ton Railroad Company of Missouri, at or near the average "price of five dollars per acre, taking the deeds in my own "name. And I further promise to sell all the lands purchased "as aforesaid as soon as possible, at such prices, as the "said Kitchen may direct, and if I should fail to sell all said

"lands as soon as the said Kitchen may desire them, I promise "to sell the same at public auction whenever so directed by "the said Kitchen, and after deducting the expenses of stamps "and the necessary traveling expenses, to pay unto the said "Martha A. Kitchen or her legal representatives, seven-eighths "of all the money that I may sell the said lands for.

"Given under my hand and seal the date above written,

"W. C. RAYBURN." [L.S.]

That in Dec. 1866, Rayburn sold and delivered the bonds to defendant Bedford, for $10,000, who afterwards sold them to defendant Webber, who afterwards and before the commencement of this suit sold them for $26,340.00; that defendants knew the contents of the writing given by Rayburn, dated 16th March, 1866; that before the commencement of the suit plaintiffs demanded the bonds from defendants and they refused to deliver them. This suit was commenced August 22d, 1868. This was all the evidence, and at its close the Court held that it did not entitle the plaintiff to a recovery in this action, and gave judgment for the defendants. The plaintiff sued out a writ of error: And upon the record the defendants submit, that there was no error in the action of the Court below.

It will be seen, that Kitchen had given the bonds described in his declaration to his wife; and that the contract made by him as her agent, with Rayburn, was in her name. It would from this cause certainly have been more conformable to the spirit of modern jurisprudence, to have joined his wife with him as plaintiff. But waiving this point, that contract is undoubtedly to be looked at for the purpose of ascertaining the relations created between Kitchen and Rayburn as to these Bonds. If they were absolutely sold to Rayburn, the title of Kitchen to them was dertermined. If they were placed in Rayburn's hands by Kitchen upon certain trusts, the inquiry remains, whether those trusts have been performed; and if they have not, does an action of trover lie for the breach of the covenant.

Looking to the letter of the contract, it would seem that the bonds and coupons were absolutely sold to Rayburn at *par*, and that he stipulated to invest this *par* value in lands, as prescribed in the bond. It is declared expressly that he

has received two sums of money amounting to $169,405.00, *"which said sum* I promise to expend in the purchase of lands &c."

There is no stipulation to sell the bonds and invest the proceeds in land, but to invest a sum which we see from the record is equal to the par value of all the bonds and coupons. If we merely look to the language employed, without going outside of the instrument and inquiring what was the intrinsic worth of these bonds, we shall be unable to come to any other conclusion than that Rayburn took the bonds and coupons, charged himself with their par value, and agreed to invest it in lands for the benefit of the former owner of the bonds. We are told nothing in the testimony of the value of these bonds. The declaration indeed says, that they were worth $302,260.00. If so, they were worth much more than par, and Rayburn purchased them on very advantageous terms, (owing probably to the depressed condition of the money market at the time of the purchase). But that circumstance, if we are at liberty to take it into account, would only show more certainly that the bonds and coupons being worth $302,260.00,—and Rayburn receiving them, and stipulating only to account for $169,305.00, or rather for seven-eights of $169,405.00, he must be taken to have *purchased* them absolutely from the owner for the latter sum. We say the *owner*, and for this purpose it is indifferent whether Mrs. Kitchen or her husband be considered the owner. If *he* was, in law (as we suppose) the owner of the bonds, then he had the *jus disponendi*. If Mrs. Rayburn was the owner, then this suit should have been brought in her name, or at lowest, in the name of herself and husband jointly.

If instead of the comparatively obscure name of W. C. Rayburn, there appeared in this document that of Jas. H Lucas or Robert Campbell, and if instead of Bonds of the Cairo and Fulton Railroad, the contract recited bonds of the U. S. Government, no one would doubt that the obligor taking the bonds as his own, charged himself with the full sum of $169,405.00, as the price thereof, and promised to invest that sum in the purchase of land. We are scarcely at liberty, in the absence of either allegation or proof, to infer that there was anything in the nature of the bonds or the pecu-

niary condition of the parties to alter the natural import of the contract, even conceding (and the concession is not small) that we could, by the light of such allegations and proofs, give to the writing produced a construction it would not naturally bear.

Again, let us substitute for the words 'bonds' and 'coupons' in Rayburn's contract, 'beef' and 'pork' respectively. If Rayburn had acknowledged that he had received twenty thousand dollars in beef and ten thousand dollars in pork, which he was to invest in land for the benefit of the person from whom he received it, every one would understand that he had received a quantity of these articles which he had taken to account at the prices named, agreeing to invest that price in lands. It would be of course possible that instead of an absolute sale to him of these articles the stipulation was that he should reduce them to money by sale in market and invest the proceeds. This is not the obvious and natural meaning of the contract, though it may be a possible one. But it is submitted that upon either construction the plaintiff is out of Court. For if the bonds were absolutely sold to Rayburn, he undertaking to invest the sum for which he purchased them in a particular way, there is of course no limitation upon his rights of ownership, and power to sell them is one of these. There is no fraud suggested or hinted at, either in the pleadings or evidence. But if there *were* fraud on Rayburn's part (of which I repeat there is no pretence) and he has failed to invest the price of the bonds in land, how are the defendants connected with it? If, on the other hand, the bonds were not sold to Rayburn, but placed in his hands that he might sell them and invest the proceeds in land, it appears monstrous that without any charge of fraud, complaint should ~~me~~ be made of his doing the very thing which he had covenanted to do.

All this time the defendants have said nothing about the novelty of trying a breach of covenant supposed to be committed by A. in an action of trover against B. It will perhaps simplify matters to suppose that Rayburn instead of Bedford & Webber is defendant in this action. If the action would not be maintainable against Rayburn, it will be difficult to show that it lies against his vendee. A vendee often stands in a better position towards a prior owner of a piece of property than his

vendor; a case in which he occupies a *worse one* has never been met with by the undersigned. Suppose then that Rayburn was the defendant—that plaintiff had demanded of him the return of the bonds and that he had refused—Could this action have been maintained against him?

It is no answer to say that in this hypothesis the fact of the sale of the Bonds, which may possibly be called a conversion, would not appear. In order to test it, let this fact be added to the hypothesis. Rayburn could and most surely would reply to such a demand, that the Bonds were put in his hands to be disposed of by him and for the investment of the proceeds in land,and that he had sold them accordingly. If then the plaintiff should allege that Rayburn had not so invested the proceeds, the incongruity of the form of action adopted with the relief sought would be so gross, that words would be wasted in pointing it out more particularly.

It need not be said that if the sale of the Bonds to Rayburn was absolute, the title to them was divested out of plaintiff, and that this is an end of the matter.

By the hypothesis adopted, much that is not shown by, or deducible from, the record is gratuitously conceded. The failure of Rayburn to respond to any legitimate demand growing out of the contract of 16. March 1866 nowhere appears. It is perfectly consistent with the record that Rayburn has invested the proceeds of the sale of the Bonds in land, that he has sold this land and distributed the proceeds according to the term of that contract. If he has not done this, he is liable for breach of his covenant; but if he *has* done it, the attempt of Kitchen to reclaim the Bonds is as irreconcilable with justice as it is with law. It being the duty of the plaintiff in error to show that theCourt of first instance has erred,and every reasonable intendment being in favor of the judgment of the Court below, what room is there for imagining that Rayburn is not a man of great wealth able to respond to any legal claim? What reason is there for imagining that the Bonds named in the contract of March 16, 1866, were either as valuable as U.S. securities or as worthless as Confederate bonds? With entire harmony with the record they may be the one or the other, or of any intermediate value. If the Bonds when sold by Rayburn in December 1866, were sold for a full price, it would be interesting

to consider how a statement on the part of the plaintiff of any cause of complaint against Rayburn could be framed. We are entirely in the dark as to their value in December 1866. We are told indeed that at some time between December 1866 and 22d August 1868 (a period of 20 or 21 months) they were resold for $26,340. Their *par* value was $169,405 at least. They were sold in December 1866 for less than six per cent. of that par value. In the course of the next 20 or 21 months they were sold for about 15 per cent. of it. From these quotations we are bound to regard them as eminently "fancy stocks", the varying prices of which in that period can hardly be considered surprising being indeed only nine per cent.—a fluctuation often experienced in stocks having a real basis of value. Then the defendants are at liberty to consider them as having been sold for a full price in the month of December 1866. It is submitted that this conclusion leaves the plaintiff without any cause to complain of *any one* in *any* form of action.

It seems hardly permissible under these circumstances to ask the attention of the Court to considerations not necessary to the decision of this case. If we have succeded in the attempt to show that no cause of action is disclosed by the record, the argument for defendants in error ought, in fairness, to close. But a few words as to the inappropriateness of the form of action adopted to vindicate any possible right of the paintiff will, it is hoped, be pardoned.

The action is against Bedford and Webber, who purchased from Rayburn, but we will as before, in order to give every possible advantage to the plaintiff, treat the question as if Rayburn himself was the defendant.

As has been already shown, if Rayburn sold the Bonds for a full price, then, no failure on his part to account for that price being suggested, the plaintiff is absolutely without a grievance against any person. Let it be supposed however that he sold them for an inadequate price. One of three consequences will follow:

1st, The Bonds were his own, purchased at a fixed price, which was by him to be invested in land, and no third person is concerned in the manner in which he sold then; or

2d, The Bonds were placed in his hands for sale upon trusts declared by a writing under seal, and he sold them for an

inadequate price under circumstances that render him answerable in damages to the owner for the resulting loss: that is to say in damages for the breach of his covenant; or

3d, The Bonds mentioned in that covenant were indeed disposed of for an inadequate price, but innocently, and in the exercise of a discretion for which Rayburn cannot be made answerable in damages.

We must look to the covenant of 16. March 1866 alone to ascertain the relations it etablishes between plaintiff and defendants; and no fourth construction occures to me as possibly predicable of it. The utmost latitude of interpretation has been indulged and every alternative view has been considered. It is submitted that the present action is not maintainable on any conceivable hypothesis.

If the bonds were sold outright to Rayburn, plaintiff can have of course no action against his vendee.

If the bonds were merely placed in Rayburn's hands with the power of sale, there is no such thing as challenging the exercise of that power without imputing fraud both to the vendor and vendee. But it is sufficient to say, that no hint of such a purpose is to be found in the record.

Were the Bonds sold by Rayburn in December 1866 for an adequate price? — We have no means of answering this question. If they were so sold, there is an end to this case and all others. — But we will *"argumenti gratia"* assume that the price was inadequate.

The question "How far inadequate?" still remains. If the price was inadequate to such a degree as would excuse dissatisfaction on the part of Kitchen, and give him a legal cause of complaint, he may bring his action against Rayburn. But what kind of action? Clearly one founded on the breach of the contract made by Rayburn; in other words an action of covenant. The action of trover lies for a lawful taking, followed by an illegal conversion. Yet if the original taking be unlawful, nay, accompanied with violence, the plaintiff may waive the trespass and sue for the conversion only (Bishop vs. Montagne, Cro. Eliz. 324. (S. C.), Cro. Jac. 50, Hartop vs. Hoare, 1 Wilson 8.) for the reason that a tort may be qualified though not increased, just as the owner of goods converted may, if he likes, waive the tort, and bring assumpsit for their value. (Dumonds, adm. vs.

Carpenter, 3 Johns, R. 183, 3 Taunt 274, Hill vs. Perrott.) But if the possession of the goods were obtained under a contract, trover cannot be maintained for them, when the contract is alleged to be broken (3 Camp. 299. Emanuel vs. Dane, per Lord Ellenborough 3 Taunt 274, ubi supra, 2 C & P. 266. Fairman vs. Gumble (Ch. J. Abbott.) And an agent by selling goods at an inadequate price does not become liable to an action of trover. (3 Taunt 117. Dufrene vs. Hutchinson, Sergent vs. Blunt, 16. John, 74.) Here is the very case presented by the second supposition; and the third needs no illustration.

To recapitulate then: 1st. If the Bonds became by purchase and sale the property of Rayburn after March 16, 1866, his vendor cannot maintain trover for them. — 2d. If the Bonds did not become the property of Rayburn by that sale, they were, *at lowest*, placed in his hands that they might be sold and the proceeds inverted in lands, according to the terms of the instrument dated 16. March 1866. Nothing short of a fraudulent sale of them can give the owner an action against the vendee. But no fraud is either expressly or impliedly imputed to Rayburn. — 3d. If it be said that the bonds were sold for a consideration so inadequate as to raise the presumption of fraud, many answers, and all of them conclusive, occur. 1° Such a presumption, if it exist at all, must be one of fact. Then, it was passed upon by the Court sitting as a Jury, and decided in favor of defendants: and so is not examinable here. 2° If it was not presented to, or passed upon by the Circuit Court, it is not the subject of review in this high court. 3° But, again, there is not a jot of evidence that the bonds were sold by Rayburn for anything short of their full value: and there is not a jot of evidence that the proceeds of them have not been invested as provided by the covenant of March 16, 1866.

Respectfully submitted by

THOMAS T. GANTT,

of counsel for defendants in error.